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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted] /83

GULF/MEDITERRANEAN PORTS CONFERENCE, ET AL., *Petitioners*,

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, H. KEMPNER, GALVESTON COTTON COMPANY, TEXAS COTTON INDUSTRIES, AND THE MEMBERS OF THE FAR EAST CONFERENCE, *Respondents*.

No. ~~1198~~ /66

FAR EAST CONFERENCE, AMERICAN PRESIDENT LINES, LTD., ISTHMIAN LINES, INC., ET AL., *Petitioners*,

v.

UNITED STATES OF AMERICA, FEDERAL MARITIME COMMISSION, H. KEMPNER, GALVESTON COTTON COMPANY, AND TEXAS COTTON INDUSTRIES, INC., *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, H. KEMPNER, GALVESTON COTTON COMPANY, AND TEXAS COTTON INDUSTRIES, IN OPPOSITION

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BRIEF FOR RESPONDENTS, H. KEMPNER, GALVESTON COTTON COMPANY, AND TEXAS COTTON INDUSTRIES, IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported in 313 F. 2d 586. The opinion of the Federal Maritime

Board has not been officially printed, but appears in 1962 A.M.C. 743 *sub nom. Isbrandtsen Co., Inc.* v. *States Marine Co., of Delaware, et al.*

STATUTES INVOLVED

The statutes involved in this proceeding are: Sections 14 and 15 of the Shipping Act, 1916, 39 Stat. 733 (1916) as amended, 46 U.S.C. 812, 814 (as they existed prior to the Moratorium); the interim dual-rate Moratorium Act, Pub. L. 85-626, 85th Cong., 72 Stat. 574, together with its several extensions; and The Saving Statute, 1 U.S.C. 109, 61 Stat. 633. These statutes appear in Appendix A of this Brief.

COUNTER-QUESTIONS PRESENTED

The following are the only questions presented for determination by this Court:

1. Whether mere silence and inaction, on the part of the Federal Maritime Board, constituted formal or specific prior approval by the Board, required under Section 15 of the Shipping Act, 1916, as amended, of the institution of exclusive patronage contract non-contract dual-rate systems by the Petitioners herein, thereby giving the systems immunity under the Anti-trust laws.

2. Whether the dual-rate Moratorium Act, Pub. L. 85-626, 72 Stat. 574, retroactively destroyed Respondents' reparation claims existing, and being prosecuted, prior to its enactment.

COUNTER-STATEMENT OF THE CASE

This case involves the legality of the exclusive patronage contract/non-contract dual-rate systems employed by the Petitioners, Gulf-Mediterranean Ports Conference and its Member Lines, and the Far East Conference and its Member Lines.

The terms "exclusive patronage contract/non-contract dual-rate system", or "dual-rate system", as used herein, refer to a group of common carriers of freight by water, operating in a Conference, that charge different rates to shippers for identical transportation services, based solely upon whether the shipper agrees to give the carriers his entire patronage. The sole consideration for the enjoyment of the lower rate is the agreement of the shipper to patronize the Conference lines exclusively, and the sole reason for the exaction of the higher non-contract rate is the refusal of the shipper to sign exclusive patronage contracts with the Conference.

The Gulf-Mediterranean Ports Conference, and the Far East Conference, are voluntary associations of steamship lines operating (among other ports) between the Gulf of Mexico ports in the United States, and ports in the Mediterranean and in the Far East areas, respectively. The Board found that the basic agreements of both Conferences have never, and do not now contain any "provisions expressly authorizing the use of an exclusive patronage contract" or "differentials in freight rates for contracting shippers" (App. "A" 25, 28—Rep. of Bd.).[1]

On July 1, 1949, the Gulf-Mediterranean Ports Conference instituted the exclusive patronage dual-rate system on cotton, fixing the non-contract rates at 20%

[1] For the convenience of the Court we shall refer to the printed version of the Report of the Federal Maritime Board set out as Appendix "A" (App. "A"), to the Petition for Petitioners, Gulf-Mediterranean Ports Conference, *et al.* All other references in this Brief refer to the page number of the Joint Appendix (J.A.) filed in the Court of Appeals below, and constituting a part of the certified transcript of Record transmitted to the Supreme Court.

higher than the contract rates. The Far East Conference initiated its dual-rate system on cotton on February 7, 1950, with a spread or differential of $4.00 per ton between the contract and non-contract rates. Neither of the Conferences submitted the dual-rate arrangements to the Federal Maritime Board for approval, and the Trial Examiner expressly found that the "contract system" of either Conference had "never been specifically and separately approved by order under section 15 of the Act" (J.A. 413, 422—Examiner's Recommended Decision, Findings of Fact 31 and 57). These Findings of the Examiner were not disturbed by the Board.

It should be carefully noted with respect to the Far East Conference Petitioners that the exclusive patronage contract dual-rate system involved herein *is the one instituted on cotton on February 7, 1950.* Insofar as the Far East Conference is concerned, this was the *only* dual-rate system considered by the Board in its Report. It is especially important to bear this fact in mind, inasmuch as the Far East Conference Petitioners, in their Statement of the Case, have set forth at some length alleged facts, occurring over a period of approximately 21 years, concerning other dual-rate systems initiated by the Far East Conference prior to the one on cotton on February 7, 1950. Such alleged facts were not considered by the Board, and are wholly irrelevant and immaterial to the question of approval of the dual-rate system on cotton instituted on February 7, 1950.

Beginning in early 1951, and continuing thereafter, the Respondents herein (Complainants before the Board), while engaged in the business of exporting cotton from Gulf ports in the United States, made

certain shipments of high density cotton on Gulf-Mediterranean Ports, and Far East, Conferences' vessels, owned or operated by member lines. The steamship companies demanded of, and charged, the Respondents[2] the higher non-contract rates. At the times and dates that Respondents made said shipments, no other adequate means were available to transport said cotton (App. "A" 32-Rep. of Bd.).

In February and March of 1953, the Respondents filed Complaints with the Federal Maritime Board (F.M.B. Dockets 732-735) to recover reparations in the amount of the differential between contract rates and the higher charges paid by them on the various shipments. The Complaints alleged that the exclusive patronage contract dual-rate systems employed by the Gulf-Mediterranean Ports, and the Far East, Conferences, were illegal in that they were in violation of the Sherman Antitrust Act,[3] and Sections 14, 15, 16, and 17 of the Shipping Act of 1916, as amended.[4] Among the specified charges was the charge that the dual-rate systems had never been approved by the Board under Section 15 of the Act.

The Board consolidated the Complaints for hearing, together with a similar Complaint filed by Isbrandtsen Co., Inc. (F.M.B. Docket 726). The Board heard oral arguments in February, 1959, but withheld its

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[2] All known cotton exporters from the Gulf ports shipped under the contract rates (J.A. 416, 417, 421—Examiner's Findings 42, 43, 50). Thus the Conference had a 100% monopoly on the carriage of all cotton, other than Respondents'; cotton constituting the most important commodity and the "life blood" of the Gulf trade (J.A. 130, 172).

[3] 26 Stat. 209 (1890), as amended, 15 U.S.C. 1 *et seq.*

[4] 39 Stat. 733 (1916), as amended, 46 U.S.C. 812, 814; 39 Stat. 734 (1916), as amended, 46 U.S.C. 815, 816.

Report until the Supreme Court decided *Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, and Congress had passed the Moratorium Act, Pub. L. 85-626, 72 Stat. 574, and the second extension thereof (App. "A" 21—Rep. of Bd.). The Report of the Board, decided August 4, 1961, was served August 9, 1961, together with its Order dismissing the Complaints.

On Petition for Review, the United States Court of Appeals for the District of Columbia Circuit, on January 10, 1963, reversed and remanded the matter to the Commission[5] for assessment of reparations. Petitions of the Gulf-Mediterranean Ports Conference, and Members of the Far East Conference, for Rehearing *en Banc* were denied *en Banc* on February 15, 1963, and February 26, 1963, respectively.

Any additional facts which may be applicable or pertinent to the determination of the questions presented will be set forth in the argument of the several propositions.

ARGUMENT

Preliminary Statement

These Cases Do Not Warrant Review on Writ of Certiorari

Rule 19 of the Supreme Court Rules provides that a review on Writ of Certiorari is a matter of judicial discretion, and will be granted only where there are special and important reasons therefor.

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[5] The Federal Maritime Board, which made the final Report and Order, was abolished, and all of its functions under the Shipping Act, 1916, 39 Stat. 728, *et seq.*, as amended, 46 U.S.C. 801, *et seq.*, insofar as here material, were transferred to the Federal Maritime Commission by Section 103(a) of Reorganization Plan No. 7 of 1961, effective August 12, 1961 (26 F.R. 7315).

In the instant cases there are no special and important reasons for the granting of the Writs, inasmuch as the underlying principles of the law involved have been clearly settled and decided. There is no conflict between the various Courts of Appeals, nor do the cases present important questions of Federal law which have not been, but should be settled by this Court, or which are in any way in conflict with this Court's decisions. In *Isbrandtsen Co., Inc.* v. *United States* (1954), 93 U.S. App. D.C. 293, 211 F. 2d 51, Cert. Den. (1954) 347 U.S. 990, where it was first specifically held that under Section 15 of the Shipping Act, 1916, a dual-rate system cannot be effectuated prior to formal or specific approval by the Federal Maritime Board, the Supreme Court denied a Writ of Certiorari. Similarly, the Supreme Court denied a Writ in *Pacific West-bound Conference* v. *Leval and Co.*, 201 Ore. 390, 269 P. 2d 541, Cert. Den. 348 U.S. 897 (1954), involving the same question. The fundamental principles of statutory construction applicable to the question concerning the retroactivity of the dual-rate system Moratorium Act have been decided by the Supreme Court in a long line of consistent decisions for well over 150 years.

Furthermore, the questions involved herein are of no public importance or interest, as distinguished from that of the parties (*Rice* v. *Sioux City Memorial Parks Cemetery* (1955), 349 U.S. 70, 74), inasmuch as the two year period of limitations, provided by Section 22 of the Shipping Act, has long since run on every other dual-rate reparation claim, except those of the Respondents, and of *Parsons & Whittemore, Inc.* v. *Rederiaktiebolaget Nordst-Jernan*, et al. (F.M.B. Dockets Nos. 805, 809-813), which, in so far as counsel can as-

certain, are the only dual-rate reparation claims that occurred prior to August 12, 1958, and which were filed within the two year statutory period.

It is, therefore, respectfully submitted that no special and important reasons for the granting of Writs of Certiorari exist in these cases.

I

THE COURT OF APPEALS PROPERLY FOUND THAT MERE SILENCE ON THE PART OF THE FEDERAL MARITIME BOARD DID NOT CONSTITUTE PRIOR APPROVAL UNDER SECTION 15 OF THE SHIPPING ACT OF THE EXCLUSIVE PATRONAGE DUAL-RATE SYSTEMS INVOLVED HEREIN

The Court of Appeals below, in a succinct and trenchant *Per Curiam* opinion, held that mere silence on the part of the Federal Maritime Board did not constitute prior approval under Section 15 of the Shipping Act, 1916,[6] of the exclusive dual-rate systems employed by the Petitioners herein, the Court stating (313 F. 2d 586-7):

> "The Federal Maritime Board denied reparations sought by the petitioners because of the imposition of dual rates said to have been unlawful. It held that, since it had not disapproved the rates, it had in effect approved them; . . . .
>
> "The discriminatory rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal."

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[6] 39 Stat. 733 (1916), as amended, 46 U.S.C. 814 (as it existed prior to the Moratorium).

There is no conflict in the record with respect to the facts concerning the question of approval. It is undisputed that no efforts were ever made by either of the Conferences to obtain approval of the dual-rate systems, and that no action was ever taken by the Federal Maritime Board.

The Board, while recognizing that the Conference agreements of the Gulf-Mediterranean Ports Conference and of the Far East Conference contain no language or provisions expressly authorizing the use of an exclusive patronage contract or differentials in freight rates for contracting shippers, and that it had never *specifically* approved or authorized either of the two Conferences to institute, use or operate under the exclusive patronage contract/non-contract dual-rate system, nevertheless, erroneously found approval of such systems under Section 15 of the Shipping Act, as amended.

In support of this finding, the Board stated that it knew of the existence of the dual-rate systems in these Conferences, by virtue of the fact that said Conferences had filed certain minutes and tariffs with the Board indicating that they were using the systems. In this connection, the Board recited two extracts from minutes of the Gulf-Mediterranean Ports Conference, dated June 21, 1949, and February 1, 1950 (seven months after the institution of the system), which the Board stated established the *existence* of the practice (App. "A" 25-27-Rep. of Bd.).

Similarly, the Board referred to extracts from the minutes of special meetings of the Far East Conference on February 14 and 16, 1950, the system having been instituted on February 7, 1950 (App. "A" 29—

Rep. of Bd.).[7] It further appears from the Board's Report that tariffs containing the dual-rates were also filed, at sometime or other, with the Board by both Conferences.

The Board then stated, in substance, that since it took no action to disapprove the foregoing documents, it, therefore, approved the dual-rate systems, initiated by the Conferences, merely by doing nothing. This silence and inaction on the part of the Board was labeled by it as "tacit approval" (App. "A" 36—Rep. of Bd.), the Board stating:

> "Approval has been tacit where no action was taken and no order was issued, and this has always been considered as appropriate and consistent with Section 15."

The foregoing statement of the Board was in flagrant disregard of the decision in *Isbrandtsen Co., Inc.* v. *United States* (1954), 93 U.S. App. D.C. 293, 211 F. 2d 51, Cert. Den. (1954) 347 U.S. 990, where the

[7] The alleged "22" acts and documents referred to by the Far East Conference Petitioners (pp. 5-7, 12 of said Petitioners' Petition), occurring over about the same number of years, were not found by the Board, and; insofar as they occurred prior to the institution by the Far East Conference of the dual-rate system on cotton on February 7 1950, are in no way pertinent. The two "acts" which seem to have taken place subsequent to 1950 (see pp. 6-7 of Petition) are statements in a brief, and a ruling by the Board in a wholly extraneous matter where dual-rate contracts were not even mentioned. Furthermore, neither of these two "acts" involved the dual-rate system on cotton instituted on February 7, 1950.

It may be of interest to note that in the case of *Far East Conference* v. *United States* (1952), 342 U.S. 570, 578, where said brief was allegedly filed, Mr. Justice Douglas, in his dissenting opinion, explicitly found that there had been no approval of the dual-rate system used by the Far East Conference, stating that, "Here no effort was made to obtain it."

Court of Appeals, District of Columbia Circuit, explicitly held that under Section 15 of the Shipping Act, a dual-rate system cannot be effectuated prior to formal or specific approval by the Board. In that case, the Japan-Atlantic and Gulf Freight Conference in December, 1952, filed a statement with the Board, pursuant to the requirements of General Order 76, proposing initiation of an exclusive patronage contract/non-contract dual-rate system. In accordance with Board procedure, notice of the filing of the Conference's proposal was published in the Federal Register. The Attorney General, on behalf of the United States, and Isbrandtsen filed protests, and requested an immediate hearing. Thereafter, without a hearing, the Board issued an order permitting the proposed system to go into effect within forty-eight hours, setting a hearing date *subsequent* to the institution of the system. Upon application of Isbrandtsen, the Court of Appeals granted an interlocutory injunction.

The Court, in its decision, in addition to the question of jurisdiction, stated that the issue involved was "does the Shipping Act require Board approval of the dual rate system before it can become effective?" In deciding this issue in the affirmative, the Court stated (211 F. 2d 51, 56):

> "'*Agreements*' *referred to in the Shipping Act are defined to include 'understandings, conferences, and other arrangements.' Clearly, a scheme of dual rates like that involved here is an 'agreement' in this sense.* It can hardly be classified as an interstitial sort of adjustment since it introduces an entirely new scheme of rate combination and discrimination not embodied in the basic agreement. *But even if it were not a new agreement, it would certainly be classed as a 'modification' of the ex-*

isting basic agreement. In either case § 15 requires that such agreements or modifications 'shall be lawful only when and as long as approved' by the Board.[23] *Until such approval is obtained, the Shipping Act makes it illegal to institute the dual rate system. And this illegality cannot be spirited away by action which the Board labels 'interlocutory * * * of a discretionary nature.'"* (Emphasis supplied; footnotes deleted except footnote 23)

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[23] "We understand the Board to agree that if the dual rate agreement here requires Board approval under § 15, the agreement could not be validated by the General Order 76 procedure prior to such approval. See Board's Brief, p. 13."

The Board's analogy between the Shipping Act and the Interstate Commerce Act, under which "rates are effective and lawful merely upon filing" (*ibid.*), was found wanting (p. 57):

> *"In marked contrast, as we have seen above, the Shipping Act which governs here contemplates an entirely different scheme of regulation. It makes orders with respect to agreements unlawful until approved. This pre-approval illegality stems from the fact that the Shipping Act specifically provides machinery for legalizing that which would otherwise be illegal under the anti-trust laws.*
>
> The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws any more than is necessary to serve the purposes of the regulatory statute. *But until this is done, the agreement is subject to the operation of the anti-trust laws, under which price fixing agreements are illegal per se."* (Emphasis supplied; footnotes deleted)

The foregoing case was cited and relied upon by the Supreme Court of Oregon in *Pacific West-bound Conference* v. *Leval & Co., Inc.* (1954), 269 P. 2d 541, Cert. Den. 384 U.S. 897; and in *River Plate & Brazil Conferences* v. *Pressed Steel Car Company Inc.*, (2d Cir. 1955), 227 F. 2d 60, wherein the dual rate systems involved were held to be illegal because not having had prior approval.[8]

In *River Plate & Brazil Conferences* v. *Pressed Steel Company, Inc.*, *supra*, the Court of Appeals for the Second Circuit, in holding that there was no approval, said (p. 63):

> "Such approval could not come subsequently, or retroactively, or by some interpretation of the Board made long after the event."

In the instant case, the Board's insistence that mere knowledge of the existence of the dual-rate systems, plus total inaction on its part, constituted Section 15 approval, is so clearly incompatible with *Isbrandtsen*, *supra*, as to make argument unnecessary.

In *Isbrandtsen*, *supra*, there was no "*tacit*" approval. There was an actual order of the Board authorizing the initiation of the system prior to a hearing thereon. It is submitted that this affirmative action carried incomparably greater weight than any so-called silent or "*tacit*" approval. Nevertheless, the system was held to be unlawful because there had been no formal approval. *A fortiori*, if the Board's affirmative Order

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[8] Accord: *Anglo Canadian Shipping Co.* v. *United States*, 264 F. 2d 405, 410, 411 (9th Cir. 1959); *Empire State Highway Transportation Ass'n., Inc.* v. *Federal Maritime Board* (1961), 110 U.S. App. D. C. 208, 291 F. 2d 336, 339 (D. C. Cir.), Cert. Den. 368 U. S. 931 (1961).

on a specific proposal for the initiation of a system was inadequate under the Shipping Act to legalize the dual-rate system, the Board's total silence and inaction, here, would be wholly ineffectual.

Finally, in further obvious refutation of the "*tacit*" or silent theory of approval advanced by the Board, there is the overall fatality implicit in the decision of *Isbrandtsen Co.* v. *United States* (1951), 96 F. Supp. 883, aff'd. (1952), by an equally divided Court *sub nom. Rederi* v. *Isbrandtsen Co.*, 342 U.S. 950. In that case the Court expressly stated that it was incumbent upon the Board to inquire into, and pass upon, considerations as to reasonableness of the spread or differential between the contract and non-contract rates. Of course, this necessary inquiry, prerequisite to the Board's approval, could not possibly have been made under a do nothing procedure, labeled by the Board as "tacit" approval. It is also in obvious refutation of, and incompatible with, the "precise findings by the Board as to a particular system's intent and effect", as stated by the Supreme Court *in Federal Maritime Board* v. *Isbrandtsen Co., Inc.*, 356 U.S. 481, 499.

Section 15 of the Act is a statutory directive which is mandatory, and which may not be dispensed with either by the wilful or careless disregard thereof by the carrier, or by the silent acquiescence therein by the Board. Approval must be actual and specific, and cannot be waived, or implied. The statutory mandate requiring prior approval not having been complied with by the Conferences, the dual rate systems employed by the Conferences were, necessarily, illegal, as found by the Court of Appeals, below.

II

THE 1958 MORATORIUM ACT DID NOT RETROACTIVELY DESTROY RESPONDENTS' REPARATION CLAIMS

The Petitioners seem to claim that the Moratorium Act (Pub. L. 85-626, 72 Stat. 574, August 12, 1958)[9] was retroactive in its effect and relieved them from all liability for reparations arising from a violation of the Shipping Act of 1916, which violation occurred long prior to the enactment of the Moratorium Act. The Court of Appeals below, *Per Curiam*, disposed of this contention by stating (313 F. 2d 586, 587):

> "We think, too, that the Moratorium Act is prospective only and so does not relieve an offender from liability for reparations arising from a violation which occurred prior to its enactment."

Retroactivity is not favored in law. For this there are sound reasons, in some cases, as in the instant case involving vested and substantial rights, serious constitutional ones.[10] However, we do not think that it is necessary for this Court to pass upon the question as to whether Congress had the power to make the legislation under consideration retroactive, for it is clear that Congress had no intention to make such legislation retroactive, nor did it, in fact, do so.

It is a firmly established and fundamental principal of statutory construction that all statutes are to be

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[9] Pub. L. 85-626, 72 Stat. 574, ceased to be effective on June 30, 1960, but was extended to June 30, 1961, by Pub. L. 86-542, 74 Stat. 253; being further extended to September 15, 1961, by Pub. L. 87-75, 75 Stat. 195; and was finally extended to October 15, 1961, by Pub. L. 87-252, 75 Stat. 521.

[10] Cf. *Forbes Pioneer Boat Line* v. *Board of Commissioners* (1922), 258 U. S. 338; *Ochoa* v. *Hernandez y Morales* (1915), 230 U. S. 139.

construed as having only a prospective operation, unless the Act clearly, by *express language*, or by *necessary* or *unavoidable implication*, requires a retroactive application. If any reasonable doubt exists, it should be resolved in favor of prospective operation. This rule has been recognized since the early days of the United States, and was trenchantly stated by this Court more than 157 years ago in *United States* v. *Heth* (1806), 3 Cranch 399, 413:[11]

> "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied. * * *
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> "To fortify the foregoing construction, it may be added, that the words of a statute, if dubious, ought, in cases of the present kind, to be taken most strongly against the law-makers."

[11] Also see: *Reynolds* v. *McArthur* (1829), 2 Pet. 417, 434; *Murray* v. *Gibson* (1853), 15 How. 420, 423; *Harvey* v. *Tyler* (1864), 2 Wall. 328, 347; *Sohn* v. *Waterson* (1873), 17 Wall. 596, 598; *Twenty Per Cent Cases* (1873), 20 Wall. 179, 187; *Auffmordt* v. *Rasin* (1880), 102 U. S. 620, 622; *Chew Heong* v. *United States* (1884), 112 U. S. 536; 559; *United States* v. *Burr* (1895), 159 U. S. 78, 82; *White* v. *United States* (1903), 191 U. S. 545, 552; *United States* v. *American Sugar Refining Co.* (1906), 202 U. S. 563, 577; *United States Fidelity and Guaranty Co.* v. *United States* (1908), 209 U. S. 306, 314; *Union Pacific Ry. R. Co.* v. *Laramie Stock Yards Co.* (1913), 231 U. S. 191, 199; *Shaw* v. *Doyle* (1922), 258 U. S. 529, 534; *Cox* v. *Hart* (1922), 260 U. S. 427, 434; *Fullerton-Krueger Lumber Co.* v. *Northern Pacific Ry. Co. et al.* (1924), 266 U. S. 435, 437; *United States* v. *St. Louis, S.F. & T.R. Co.* (1925), 270 U. S. 1, 3; *United States* v. *Magnolia Petroleum Co.* (1928), 276 U. S. 160-162; *Brewster* v. *Gage* (1929), 280 U. S. 327, 337; *Miller* v. *United States* (1935), 294 U. S. 435, 439; *Hassett* v. *Welch* (1938), 303 U. S. 303, 314; *Claridge Apartments Co.* v. *Commissioner of Internal Revenue* (1944), 323 U. S. 141, 164; 82 C.J.S., Statutes, Sections 414-415; Sutherland, Statutory Construction, 3rd Edition (1943), Vol. 2, Sec. 2201; Crawford Statutory Construction, (1940), Sec. 277.

Similarly, Mr. Chief Justice Marshall in *Reynolds v. McArthur* (1829), 2 Pet. 417, 434, said:

> "It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively, unless the language of the act shall render such construction indispensable."

Indeed, as stated by Mr. Justice Peckham in *United States Fidelity and Guaranty Co. v. United States* (1908), 209 U.S. 306, 314, there is a presumption against retrospective operation, and a statute should not receive such a construction if it is susceptible of any other:[12]

> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied."

Certainly, there is no declaration of retroactivity, "*clear, strong* and *imperative*" in the language of the 1958 Moratorium Act which would justify a retroactive construction. In fact, there is nothing in the language of the Act, nor in its legislative history, which

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[12] See also: *White v. United States* (1903), 191 U. S. 545, 552; *United States v. American Sugar Refining Co.* (1906), 202 U. S. 563, 577; *Hassett v. Welch* (1938), 303 U. S. 303, 314; 82 C.J.S., Statutes, Sec. 415.

even remotely supports a retroactive construction. Had Congress so intended, it would have used correspondingly appropriate language, of which it is quite cognizable and capable.[13] To the contrary, the language of the Act was directed to the future, and Section 2 of the Act explicitly provided that "This Act shall be effective immediately upon enactment", thereby making it prospective only in its operation. 82 C. J. S., Statutes, Sec. 413.

1. The Legislative History of the Moratorium Act

On May 19, 1958, the Supreme Court decided the case of *Federal Maritime Board* v. *Isbrandtsen Co., Inc., et al*, 356 U.S. 481, 78 S. Ct. 851, stating (356 U.S. at p. 493):

> "Since the Board found that the dual-rate contract of the Conference was 'a necessary competitive measure to offset the effect of non-conference competition, required "to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in this trade,' it follows that the contract was a 'resort to to other discriminating or unfair methods' to stifle outside competition in violation of § 14 Third."[14]

This decision cast grave doubts upon the legality *per se* of all dual-rate systems[15] and Congress, in order

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[13] See Portal to Portal Act of 1947, 61 Stat. 84, 29 U.S.C. 251, *et seq.*

[14] 39 Stat. 733 (1916), as amended, 46 U.S.C. 812.

[15] As stated in Senate Report No. 860, August 31, 1961, 87th Cong. 1st Sess.: "... every effective dual-rate contract used by a conference is *intended*, and reasonably likely, and tends to cause nonconference lines *either to join the conference* using the contract or *to leave the trade for happy hunting elsewhere.*" (U.S. Code Congressional and Administrative News, 1961, Vol. 2, p. 3128). (Emphasis supplied).

to stay the effects of the decision pending such time that it could undertake and complete a thorough study of steamship conferences and their dual-rate practices,[16] passed the interim legislation amending Section 14 of the Shipping Act, 1916. That the sole and only purpose of the legislation was to stay the effects of the Supreme Court's decision in *Federal Maritime Board* v. *Isbrandtsen Co., Inc., supra,* is undisputed, and there is nothing in its legislative history to indicate otherwise.

Thus, the interim legislation authorized existing dual-rate arrangements *affected by the Isbrandtsen decision* to remain in effect.[17] However, it was never the intent or purpose of Congress in passing such legislation, to relax, modify, or render impotent, the then existing statutory procedures and requirements contained or implicit in other provisions of the Shipping Act, such as the necessity for prior approval under Section 15 (*Isbrandtsen Co., Inc.* v. *United States* (1954), 93 U.S. App. D.C. 293, 211 F. 2d 51, Cert. Den. (1954), 347 U.S. 990), and that the spreads or differentials between the contract and non-contract rates could not be arbitrarily fixed in violation of Sections 16 and

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[16] Sen. Rep. 1709, 85th Cong., 2d. Sess. 2 (1958); H. Rep. 2055, 85th Cong., 2d. Sess. 1 (1958); 104 Cong. Rec. 12908 (1958) (Chairman Magnuson); *id.* at 15641 (Chairman Bonner).

[17] However, even with respect to those, the Board still retained the power under the Moratorium Act to disapprove, cancel or modify, in accordance with the standards set forth in Section 15 of the Act, which standards contain, among other specified criteria, "or to be in violation of this chapter," as well as the approval requirement. Hence, the Board not only had the authority, but had a compulsive duty to determine the legality of any existing dual-rate system. *Anglo Canadian Shipping Co.* v. *United States,* 264 F. 2d 405, 411; *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 892.

17 (*Isbrandtsen Co., Inc.* v. *United States* (1951), 96 F. Supp. 883, aff'd. by an equally divided Court, *sub nom. Rederi* v. *Isbrandtsen Co.* 342 U.S. 950 (1952).

Thus, the purpose of the legislation was to "extend . . . the right of"[18] (S.R. No. 1497, June 1, 1960, 86th Cong. 2d Sess., U.S. Code Cong. and Adm. News, 1960, Vol. 2, p. 2461), or to "authorize"[19] (S.R. No. 860, Aug. 31, 1961, 87th Cong. 1st Sess., U.S. Code Cong. and Adm. News, 1961, Vol. 2, P. 3108), conferences to employ a dual-rate system. The clear intent and purpose of Congress was to permit or authorize the use of the dual-rate system, from the effective date of the first moratorium, notwithstanding *Isbrandtsen, supra,* if a conference so desired. *The criteria and standards contained in other provisions of the Shipping Act, and which had no bearing whatsoever on the question of illegality per se of dual-rate systems, were in no way disturbed.*

In *Anglo Canadian Shipping Company* v. *United States* (1959), 264 F. 2d 405, 410, the Court of Appeals, Ninth Circuit, after noting the provisions of Public Law 85-626, 72 Stat. 574, proceeded to hold that approval of the dual-rate agreement was required under Section 15 of the Shipping Act. It is further to be observed that the United States Court of Appeals, District of Columbia Circuit, in *Empire State Highway Transportation Association, Inc.* v. *Federal Maritime*

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[18] "Accordingly, H. R. 10840 would amend Public Law § 5-626 in order to extend for one year the *right of eligible conferences to employ a dual-rate system.*" (Emphasis supplied).

[19] "The primary purpose of this amended bill is to *authorize* ocean common carriers and conferences thereof serving the foreign commerce of the United States to enter into effective and fair dual-rate contracts with shippers." (Emphasis supplied)

Board (1961), 110 U.S. App. D.C. 208, 291 F. 2d 336, 341, Cert. Den. 368 U.S. 931, stated that in the wake of *Isbrandtsen, supra,* "Congress moved to preserve the *status quo* as far as dual-rate arrangements *affected* by that decision were concerned." (Emphasis Supplied). Thus, the effect of the interim legislation was limited to those dual-rate arrangements *affected* by the *Isbrandtsen* decision, and that *did not* include dual-rate arrangements that were invalid because there had been no prior approval, or because the spreads had been arbitrarily fixed without reference to an adequate determining principle or standard. Indeed the *status quo,* which existed as of the date of the *Isbrandtsen decision,* and which it was the purpose of the interim law to preserve,[20] clearly included the preservation of the approval requirement.[21]

It is submitted that the phrase "forbid or make unlawful" contained in Pub. L. 85-626, when viewed in light of the Act's legislative history, clearly refers to a *per se* illegality of the dual-rate system. And even with respect to this *per se* illegality, there is nothing

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[20] *Empire State Highway Transportation Ass'n, Inc. v. United States, supra,* 291 F. 2d at 341; 104 Cong. Rec. 12908 (1958) (Chairman Magnuson); *id.* at 15641 (Chairman Bonner); Hearings on H.R. 6775 Before the Merchant Marine & Fisheries Subcommittee of the Senate Commerce Committee, 87th Cong., 1st Sess. 16 (1961) (Chairman Celler); S. Rep. 1709, 85th Cong., 2d Sess. (1958), at 5, 6, 9 (Board Vice Chairman Guill); *id.* at 5 (Acting Secretary of Commerce Williams).

[21] That this is in accord with the intent of Congress is borne out by the Senate Report on the first extension of the Moratorium. The Committee described the Moratorium as allowing "the continued use by conferences of a dual rate system *validly* in effect on the date of the Supreme Court's decision." S.R. No. 1497, 86th Cong., 2d Sess. 2 (1960), U.S. Code Cong. and Adm. News, 1960, Vol. 2, p. 2461. (Emphasis supplied)

in the Act, nor in its legislative history, that would require a retroactive construction.

However, this Court need not decide the question as to whether the Moratorium Act legalized dual-rate systems not theretofore approved by the Board. The issue in this case is considerably more limited—whether the interim dual-rate legislation *retroactively* validated existing unapproved dual-rate systems, thereby retroactively destroying reparation claims which had previously arisen. When the intent of Congress to wipe out the approval requirement *even prospectively* is so ambiguous, *a fortiori* there can be no valid basis for concluding that the approval requirement was abolished retroactively for the period prior to the enactment of the interim legislation.

It is submitted that, so far from the Court being compelled by the language of the Act to give a retrospective operation, the plain and obvious meaning of the Act, interpreted with reference to the general scope and declared legislative purpose, utterly forbids the conclusion that there was any intention to impair or destroy rights previously existing.[22] Certainly, there is no declaration of retroactivity "so clear, strong and imperative, that no other meaning can be annexed", nor does the intention of Congress demand such a construction.[23]

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[22] The letter from the Department of Justice to Chairman Bonner of the House Committee, referred to by Judge Danaher in his dissenting opinion (313 F. 2d 586, 587), is entirely inapposite to the question of retroactivity, since, at the most, it merely expresses an opinion as to the possible *future* effects of the proposed legislation

[23] *United States* v. *Heth* (1806), 3 Cranch 399, 413, *supra*, and cases cited in footnote 11, *supra*.

2. The Respondents' Reparation Claims Are Preserved by the General Saving Statute

Title 1, U.S.C., Section 109 (61 Stat. 633) provides in pertinent part:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

It is to be noted that this statute not *only* saved from extinction a liability incurred under the repealed statute, but it saved the statute itself "for the purpose of sustaining any proper action . . . for the enforcement of such . . . liability." *De La Rama S.S. Co., Inc.* v. *United States* (1953), 344 U.S. 386, 389. This statute applies not only in the case of repeal, but also to amendments, for in either event a new statute comes into being, and the old one ceases to exist. *Morehead* v. *Hunter* (10 Cir., 1952), 198 F. 2d 52, 53; *United States* v. *Taylor* (S.D.N.Y. 1954), 123 F. Supp. 920, 922, aff'd. 227 F. 2d 958, Cert. Den. 353 U.S. 961; *National Labor Relations Board* v. *National Garment Co.* (8 Cir., 1948), 166 F. 2d 233, 236-237.

While these Respondents contend that the dual-rate Moratorium Act was clearly prospective in its operation, nevertheless, even if it were retroactive in any respect, there can be no question but that the liabilities of the carriers which Respondents sought to enforce before the Board fall directly within the purview of Section 109. Hence, since the interim dual-rate Moratorium did not "expressly provide" that such liability

was to be "released" or "extinguished", the Respondents' claims were preserved, to the extent that they existed prior to the Moratorium of August 12, 1958.

III

THE QUESTION OF DAMAGES IS NOT PROPERLY BEFORE THIS COURT

The Far East Conference Petitioners have raised the question concerning the assessment of reparations, the essence of said Petitioners' contention being that the Respondents have not proved the proper measure of damages.

This question was not passed upon by either the Federal Maritime Board, or the Court of Appeals below. The Board, in its Report, upon finding that no liability, of any nature whatsoever, existed by virtue of the fact that the dual-rate systems had been properly approved, and were otherwise legally instituted, issued an Order dismissing the Complaints without passing upon the question of reparations, or the measure thereof. Although the question concerning the measure of damages was raised in the Briefs of all Parties upon appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court of Appeals did not pass upon this question, but remanded the matter to the Commission for assessment of reparations. Apparently, this action on the part of the Court of Appeals was induced by the fact the Court considered that it was within the province of the Commission to pass upon the matter in the first instance. *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474; *Far East Conference* v. *United States*, 342 U.S. 570.

Since, under the foregoing cases, the Federal Maritime Commission has the primary jurisdiction to pass

upon this question, it is submitted that the action of the Court of Appeals, in remanding the case to the Commission for assessment of reparations, was entirely proper.

CONCLUSION

For the foregoing reasons, it is submitted that the Petitions of the Gulf-Mediterranean Ports Conference, et al., and of the Far East Conference, et al., for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, should be denied.

Respectfully submitted,

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